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In the Supreme Court of the United States

OCTOBER TERM, 1969.

No. 225

WILLIAM B. CAMP,
COMPTROLLER OF THE CURRENCY,
PETITIONER,

v.

THE WINGATE CORPORATION,
RESPONDENT.

BRIEF OF THE WINGATE CORPORATION, RESPONDENT, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Statement Of The Case

On September 28, 1967 Respondent, The Wingate Corporation, (hereinafter referred to as "Respondent") filed a complaint in the United States District Court for the District of Rhode Island seeking a temporary restraining order, injunctive relief and damages against Industrial National Bank of Rhode Island, (hereinafter referred to as "Industrial") for engaging in the business of performing data processing services for the public at large. The action was precipitated by an announcement by Industrial and

the City of Providence, Rhode Island of a proposed contract whereby Industrial would provide all future data processing services for the City of Providence. The contract contemplated the transfer of a number of City workers to Industrial's payroll, the termination of the City's leasing of its IBM computer and, in effect, the complete takeover of a department of City government by Industrial.

On the morning of September 28, when Respondent's complaint was filed, attorneys representing the City of Providence, Industrial, and the Comptroller of Currency, (hereinafter referred to as "Comptroller") attended the hearing on Respondent's request for a temporary restraining order. Since neither the City nor the Comptroller were parties to the proceedings, their representatives attended by consent of all the parties. Both the Comptroller and the City advised the Court that motions to intervene were being prepared and would be promptly filed. At the time of the hearing the contract between Industrial and the City had not been signed. The court denied Respondent's motion for a temporary restraining order and fixed the date on which Respondent's motion for a preliminary injunction would be heard. Soon thereafter the City and the Comptroller filed motions to intervene, which, in turn, were followed by the American Bankers Association's filing a motion to intervene as *amicus curiae*. On October 11, 1967 a consent order was entered granting all motions to intervene and allowing Respondent an additional week within which to file an amended complaint. The amended complaint contained allegations with respect to certain actions by the Comptroller and sought injunctive relief against the Comptroller's promulgating any further rules or regulations purporting to authorize national banks to engage in the data processing business. By the end of October, 1967 all three defendants had filed motions to dismiss.

After receiving briefs and hearing arguments, the District Court granted the motions to dismiss. In doing so, the District Court held that in order for Respondent to have standing to challenge Industrial's data processing activities, it would have to show that the statutory provisions prohibiting such activities were intended by Congress to protect the Respondent from the competition of which it complained. The District Court reviewed both paragraph Seventh of 12 U.S.C. § 24 and 12 U.S.C. §§ 1861 to 1865, (Pet. App. C., pages 35 through 37). Looking at each of those provisions separately, the District Court failed to find any Congressional purpose to protect the Plaintiff-Respondent.

On appeal to the First Circuit Court of Appeals, *the Circuit Court followed exactly the same rule of law as had been applied by the District Court.* But, in so doing, the Circuit Court reversed. It found that the determination of the District Court, that there was no Congressional intent to protect the Respondent, was erroneous. The Circuit Court came to the opposite conclusion because it viewed the said sections 24 Seventh and 1861 to 1865 of Title 12 of the United States Code as being part of a single statutory scheme for the regulation of the national banking industry. In doing so, it considered the relationship of the two sections and concluded that if they were not read in conjunction with one another, absurd results would follow. In the words of the court:

> We conclude that the present plaintiff is within the class of persons intended to be protected by section 4 of the 1962 legislation, and the only question is whether standing exists to complain not of competition from bank service corporations, but from national banks directly. We conclude in the affirmative. When Congress so explicitly provides protection for a par-

> ticular business against competition from a regulated national entity — even though indirectly by regulating a subsidiary — standing exists at least to entertain complaints by that business concerning its competitive relationship to the national entity. (Pet. App. A., page 20).

To illustrate the necessity of reading the two provisions in conjunction with each other, the court later went on:

> If the section four prohibition could be avoided by a small national bank, member of a group owning a service corporation, soliciting its own data processing customers to be serviced by the subsidiary via the bank, the prohibition would be largely illusory. And if a small bank could not directly solicit such customers, it would follow that the large banks, owning their own equipment, could not, or the equalizing effect of the Bank Service Corporation Act would be lost. (Pet. App A., pages 20 and 21).

Inasmuch as this case has proceeded no further than initial motions to dismiss, there is no record upon which this Court can determine the nature of the activities questioned. As indicated above and as appears in the pleadings, this suit was precipitated by the announcement of a pending contract for data processing services between Industrial and the City of Providence. The complaint, however, is not limited in its scope to this single contract, but seeks relief against any and all of Industrial's illegal data processing operations. The Comptroller of Currency intervened apparently to defend the validity of his ruling to the effect that national banks may provide data processing services for their customers and for other banks incidental to their banking services. On the basis of representations made by

Industrial to the Comptroller, the Comptroller filed an affidavit defending his ruling and indicating his belief that this particular activity of Industrial's did fall within the scope of said ruling. No admissible evidence has yet been developed on the question of whether Industrial's data processing services would come within the Comptroller's ruling, even if that ruling were by its terms valid. Furthermore, Respondent has received information which indicates that Industrial's data processing services have continued to develop into areas that do not appear to be even arguably incidental to its banking services. In recent months Industrial, either itself or through the device of an affiliated corporation, has been actively engaged in soliciting data processing customers in Connecticut and Massachusetts notwithstanding the fact that its banking activities are for the most part restricted to Rhode Island. Because none of the pertinent facts have been ascertained in the District Court, Respondent submits that the appellate record is not sufficiently complete to permit an appropriate determination of the nature of the illegal activities. It would seem untimely for the United States Supreme Court to review even the question of standing in this case since the right to challenge certain activities may itself be somewhat dependent upon the nature of the activities involved.

Respondent, The Wingate Corporation, has already filed a brief in opposition to the petition for a writ of certiorari of Industrial National Bank of Rhode Island, in October Term, 1968 No. 1408, redesignated October Term, 1969 No. 129. That matter and the captioned matter are in substance one and the same, the only difference being that the two petitions to this Court were brought separately by the two defendants. The arguments set forth in the Respondent's brief in opposition to Industrial's petition are equally relevant here, and rather than present the Court with a repetitious brief, Respondent respectfully refers the Court to the Respondent's said brief in No. 129.

The Respondent is submitting this additional brief because it believes that petitions and briefs already on file in these related proceedings may tend to create some confusion or may not fully apprise this Court of the real issues which would be presented if certiorari were to be granted in this case. There are two areas in the Comptroller's brief which the Respondent believes tend to be misleading as to the real issues involved.

I. The Relationship Of 12 U.S.C. § 24 Seventh And 12 U.S.C. §§ 1861 - 1865 To Each Other And To The Questions Involved In This Case.

Both Industrial's and the Comptroller's petitions phrase the "question presented" in such a way as to suggest that the issue involved is simply whether the Plaintiff-Respondent can rely on 12 U.S.C. §§ 1861 to 1865 standing alone. Both petitions imply that 12 U.S.C. § 24 Seventh is totally irrelevant to the question at hand. This focuses on a spurious issue. Certainly, if certiorari is granted at this stage of the proceedings, Congressional intent would be determined not by viewing each section in isolation, but by viewing the relationship between the sections since each is an integral part of a single statutory scheme of bank regulation.

The Court of Appeals realized the absurd results which would follow from reading either of the statutory sections in question completely separate and apart from the other. Since this brief is directed only to the question of certiorari and is not intended to reach the merits, Respondent will not explore at this time the possible implications of reading the statutory sections in isolation. Nor will the Respondent attempt in this brief to discuss the merits of the Court of Appeal's interpretation. It is merely Respondent's purpose to bring into focus the hornbook principles

of statutory construction which were involved in the Court of Appeals' decision, and to make clear to the Court that if certiorari were granted, any argument on the merits by the Respondent would be directed towards the interrelationship of these statutory provisions and not, as petitioners suggest, to any question of whether the Bank Service Corporation Act standing alone has any particular relevance.

The hornbook principles of statutory construction which the Respondent believes are here involved are stated 50 AM. JUR., *Statutes*, Section 348.

> It is a fundamental rule of statutory construction that sections and acts in pari materia, and all parts thereof, should be construed together, and compared with each other. No one act, or portion of all the acts, should be singled out for consideration apart from all the legislation on the subject. Under this rule, each statute or section is construed in the light of, with reference to, or in connection with, other statutes or sections. Recourse is had to the several statutes or sections for the purpose of arriving at a correct interpretation of any particular one. The object of the rule is to ascertain and carry into effect the intention of the legislature. It proceeds upon the supposition that the several statutes were governed by one spirit and policy, and were intended to be consistent and harmonious in their several parts and provisions. . . .

Section 349 of the same treatise continues:

> Under the rule of statutory construction of statutes in pari materia, statutes are not to be considered as isolated fragments of law, but as a whole, or as parts of a great, connected, homogeneous system, or a single

and complete statutory arrangement. Such statutes are considered as if they constituted but one act, so that sections of one act may be considered as though they were parts of the other act, as far as this can reasonably be done. *Indeed, as a general rule, where legislation dealing with a particular subject consists of a system of related general provisions indicative of a settled policy, new enactments of a fragmentary nature on that subject are to be taken as intended to fit into the existing system and to be carried into effect conformably to it, and they should be so construed as to harmonize the general tenor or purport of the system and make the scheme consistent in all its parts and uniform in its operation, unless a different purpose is shown plainly or with irresistible clearness.* . . . (Emphasis added.)

Section 352 continues:

The different parts of a statute reflect light upon each other, and statutory provisions are regarded as in pari materia where they are parts of the same act. Hence, the statute should be construed in its entirety, and as a whole. The general intention is the key to the whole act, and the intention of the whole controls the interpretation of its parts. The fact that a statute is subdivided into sections or other parts should not obstruct or obscure the interpretation of the law as a whole. All parts of the act should be considered, compaired, and construed together. It is not permissible to rest the construction upon any one part alone, or upon isolated words, phrases, clauses, or sentences, or to give undue effect thereto. . . .

The fact that the provisions of 12 U.S.C. §§ 1861 to 1865

were enacted long subsequent to Section 24 Seventh of the same title does not in any way alter the application of the general rules stated above. In the circumstances here the subsequent enactment is indicative of a legislative intention to restrict banks in certain areas of data processing for the purpose of protecting competing enterprises in those areas. Simply because Congress did not at that time amend 12 U.S.C. Section 24 Seventh does not mean that Congress was not giving shape to the entire statutory scheme of the regulation of national banks. It means only that in further shaping and refining this regulatory scheme, Congress deemed the earlier broad provision to be sufficient to accomplish the purposes which Congress intended to embody in the statute. The concept of interpreting an earlier Section of a Statute in the light of a later Section is recognized in 50 AM. JUR., *Statutes*, Section 337:

> The interpretation of a statute by the legislative department of the government may go far to remove doubt as to its meaning. This fact is recognized by the courts which regard it as proper, in determining the meaning of a statute, to take into consideration subsequent action of the legislature, or the interpretation which the legislature subsequently places upon the statute. There are no principles of construction which prevent the utilization by the courts of subsequent enactments or amendments as an aid in arriving at the correct meaning of a prior statute, and it is very common for a court, in construing a statute, to refer to subsequent legislation as impliedly confirming the view which the court has decided to adopt. Indeed, it has been held that if it can be gathered from a subsequent statute in pari materia what meaning the legislature attached to the words of a former statute, they will amount to a legislative

> declaration of its meaning, and will govern the construction of the first statute. Under this rule, an amendment to an act may be resorted to for the discovery of the legislative intention in the enactment amended. In the application of these rules, it is generally held that the legislative body may by statute declare construction of previous statutes so as to bind the courts in reference to all transactions occurring after the passage of the new law. . . .

¶ It is the general principles involved in the above sections that are at the heart of the Court of Appeals' decision in this case. Respondent feels that to state the issue in terms of one statute or the other is misleading as to the questions which would be presented if certiorari were granted.

II. The Question Of Whether The Respondent Is Alleging That The Activities Complained Of Are Merely *Ultra Vires* Or Unauthorized Or Are Specifically Prohibited Activities Under The National Bank Act.

It can be seen from the Comptroller's petition that the subtle, but important distinction between an *ultra vires* and a prohibited activity has caused some confusion in this case. On page 2 of the Comptroller's Petition under the heading of "Question Presented", the Comptroller appears to recognize that the Respondent is complaining of *prohibited* activities. Nevertheless in his statement on pages 3 and 4 of his petition he refers to the complained of acts as being *ultra vires*. The Respondent would like to clarify that it is alleging that Industrial's complained of activities are not merely *ultra vires*, but are prohibited.

The term *ultra vires* has been defined as meaning an act

not within the express or implied powers of the corporation as fixed by its charter, the statutes or common law. This definition became relevant in the District Court in this case when Industrial, using this definition and relying on *New Orleans M. & T. R. Co.* v. *Ellerman*, 105 U.S. 166 (1882) asserted "...that a stranger has no standing to complain of competition injurious to him upon the ground that the defendant competitor is engaged in *ultra vires* activities."

The above definition of *ultra vires* makes no distinction between (i) acts which are beyond the powers conferred upon a corporation and (ii) acts which are illegal in that they are *not only* beyond the powers of a corporation but are expressly or impliedly prohibited by statute. This distinction is recognized in *Jackson* v. *Western Union Telegraph Co.*, 269 F. 598 (5 Cir., 1921) wherein the Court, at page 600, after observing that the acts contemplated by the contract in question were prohibited, went on to state "The contract was not merely ultra vires in the proper sense; that is to say, outside the object of the corporation's creation as defined in the law of its organization, but was explicitly prohibited by statute. Such a contract is not voidable only, but is wholly void, and of no legal effect." The significance of this distinction is discussed in Section 3400, Vol. 7 of Fletcher CYCLOPEDIA CORPORATIONS at page 568, wherein it is stated that

> It would greatly facilitate a clear understanding of the law in connection with this subject if the courts and writers would not use the word 'illegal' where an act or contract of a corporation is merely beyond its powers as distinguished from being expressly or impliedly forbidden by express words in a statute or the charter or against morals or against public policy. If an act or contract is illegal, as the term is used here-

> in, it is doubtless ultra vires in the broad sense as being 'without power'; but for the purpose of applying one set of rules to acts or contracts which are merely beyond the powers of the corporation, and another set of rules to acts or contracts which are not only beyond the powers of the corporation but are prohibited by statute or charter or are immoral or are against public policy, it is necessary to separate the two and treat them as involving different matters.

Prior to this discussion, at page 567, it is observed that

> [A]n illegal act or contract, defined as one expressly prohibited by the charter or a general statute, or which is immoral or against public policy, is ultra vires *and also something more*. It is illegal, not merely because it is ultra vires, or beyond the powers conferred upon the corporation, but, as in the case of an act of a natural person, because of its immorality, or of its being contrary to public policy, or its being in violation of an express legislative prohibition. (Emphasis added.)

It is Respondent's position that under the National Bank Act, Title 12 U.S.C., national banks are prohibited from engaging in the business of providing data processing services for the public at large. Clearly, *Ellerman* and similar cases do not stand for the proposition that an injured competitor has no standing to complain against a *prohibited* activity which results in illegal competition. There was no prohibited activity in *Ellerman*. There the plaintiff's position was merely that the defendant railroad was acting beyond its corporate powers. In the instant pro-

ceeding Respondent alleges that Industrial is engaged in prohibited activity resulting in illegal competition with Respondent in that the National Bank Act prohibits national banks from providing data processing services for the public at large.

The implications of this distinction were thoroughly briefed and argued in the District Court and many authorities were submitted which Respondent believes both support the distinction and support its assertion that we are here concerned with a prohibited activity. Respondent is complaining about a prohibited activity such as that in *Hardin* v. *Kentucky Utilities Company*, 390 U.S. 1 (1968), and is not simply alleging that the complained of activity is beyond the corporate powers of Industrial as was the situation in *Ellerman, supra*, and similar cases.

In view of the foregoing, Respondent respectfully submits that this Court, in deciding whether to grant certiorari in this case, should view the question presented as follows:

Question Presented

Was the First Circuit Court of Appeals' finding that Congress intended to protect non-bank data processing firms from certain types of prohibited bank competition erroneous simply because such finding was based upon a reading *in pari materia* of several sections of Title 12 of The United States Code (relating to national bank regulation).

Reasons To Deny The Writ Of Certiorari

As indicated above, the Respondent has fully set forth its arguments for the denial of the writ of certiorari in its

brief in opposition to the petition for such a writ filed by the Industrial National Bank of Rhode Island, October Term, 1969 No. 129. Respondent respectfully refers the Court to the arguments set forth in that brief.

It is hoped that the fuller exposition of the facts and issues in this brief will persuade this Court that until the District Court is able to take evidence and draw conclusions of law and fact, it would be inappropriate to proceed with further appellate review. As this case presently stands, the First Circuit Court of Appeals has merely given Respondent the opportunity to be heard in court. The questions of the substantive interpretations of the National Bank Act and the application of the particular set of facts to that act have not yet been reached.

Conclusion

There is no disparity between the District Court and the Court of Appeals as to the applicable rules of law. The District Court and the Court of Appeals both agreed that the Respondent would have standing to sue if the applicable statutes showed a Congressional intent to protect the Respondent. The only difference between the two courts was in their method of ascertaining the intent of Congress. The Court of Appeals felt that Congressional intent could be ascertained only by reading *in pari materia* the various relevant sections of the statutes regulating national banking, while the District Court chose instead to view the various parts of our national banking laws as being unrelated and not part of a single comprehensive legislative scheme.

It would seem that since the Court of Appeals has determined that the requisite Congressional intent exists to provide standing for the Respondent, and there appears

to be no doubt as to the applicable law, the petitions for writs of certiorari should be denied and this case should be remanded to the District Court for further proceedings.

Respectfully submitted

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